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SUBJECT: BOSNIA- CHALLENGES FOR THE STATE COURT

Classified By: Political Counselor Michael Murphy for reasons 1.4 (b) a
nd (d)

11. (C) SUMMARY: Over the past four years, the State Prosecutor,s Office and State Court have made important strides building Bosnia,s capacity to try war crimes cases. Preliminary information on likely future war crimes cases suggests a demanding workload and challenges for both the prosecutor and the court. The Prosecutor,s Office is finishing work on its demographic analysis and case selection guidelines, something we have pressed for since the February verdict of the International Court of Justice (ICJ). The Court is also exploring ways to improve its case management system to improve efficiency. Resource issues will remain important constraints on what each institution can do. Availability of witnesses and suspects and translation needs will also continue to challenge the work of the prosecution and court. Much of the progress at the State Court has been driven by the international prosecutors and judges who work there. END SUMMARY

13,000 Cases Overestimates the Workload

12. (C) The exact number of war crimes cases in Bosnia is unclear, though there is much speculation among officials and the general public. The inflated and unsupported estimate of 13,000 is often quoted in the press and by Chief Prosecutor Jurcevic. According to David Schwendiman (please protect), the American Deputy Chief Prosecutor for the Special Department for War Crimes, the Rules of the Road (RoR) case inventory best illustrates the real work load. (Note: RoR cases are those reviewed by ICTY under the 1996 Rome Agreement between 1996 and 2004, to determine whether a sufficient threshold under international humanitarian law has been met and warranted prosecution by local authorities. End Note)

13. (C) There are roughly 4,000 RoR cases, but only 877, involving 777 suspects, have any possibility of successful prosecution, Schwendiman argues. Accepting the 877 figure-- still a daunting case load-- would allow prosecutors and judges to begin planning criteria and resources to handle this more realistic number rather than continuing to operate based on the assumption that they must ultimately try 13,000 cases. However, because the 13,000 figure has acquired a quasi-official status, leaders of Bosnia,s judicial institutions, let alone Bosnia,s political leaders, are afraid to challenge it. This prevents more thoughtful planning and political debate on how best to manage Bosnia,s

war crimes legacy, Schwendiman maintains.

Real State Court Workload Closer to 450

¶4. (C) The State Prosecutor,s Office classifies 202 of the 877 RoR cases "highly sensitive." These cases will be investigated and, if there is an indictment, prosecuted in the State Court. There are also about 200 additional cases in a gray area that could neither be classified as "highly sensitive" or "sensitive" and were kept by the Prosecutor,s Office for further consideration. The 400 priority RoR cases, six Rule 11 bis cases, and 40 "Category 2" files transferred from the ICTY means that the State Prosecutor,s Office,s current workload is approximately 450 known cases. The Prosecutor,s Office will refer the remaining 475 RoR cases, which are considered "sensitive," to the cantonal and district prosecutors, offices and courts. RoR cases assessed as having little chance of being prosecuted successfully (approximately 3,100) would have to wait until all 877 cases have been completed.

Clearing Cases: 10-15 Years

¶5. (C) Schwendiman believes it is possible for the Prosecutor,s Office to process about 450 war crimes cases in 10-15 years. According to his calculations, one prosecutor can handle three to four cases per year. This means the 17 war crimes prosecutors could handle a total of 51-68 cases per year for ten years. Schwendiman conceded that it is difficult to predict the average time to process one case but estimates it could take nine to 18 months for a case to go

SARAJEVO 00002555 002 OF 004

from the investigative stage to a verdict. Maintaining a high-level pace in the Special Department for War Crimes would require training and developing new managers for these cases, however. As these managers become more experienced, their efficiency should improve.

But More Judges Would Be Required

¶6. (C) The Court,s Section I for War Crimes does not appear capable of handling the volume of cases Schwendiman foresees. The Court,s war crimes section has five first-instance panels composed of three judges each. Operating at maximum capacity, each panel could try four cases per week (a different case each day) -- a total of 20 cases/week for all five panels. If the State Court is expected to keep up with the pace of indictments issued by the Prosecutor,s Office, a doubling or tripling of State Court judges would be necessary. Hiring more judges may also present problems for the State Court, which has had difficulties in finding qualified nationals to fill its current vacant judicial positions. Most entity judges see their career paths within their entity,s judicial structure and feel there is little prestige or incentive in working on politically and ethnically sensitive cases at the State Court.

Guidelines and Criteria

¶7. (C) In the past two years, decisions regarding case selection and priorities have been made mostly in response to public and political pressures, resulting in the easiest and most expedient cases going forward rather than the more important ones. This has also contributed to confusion in and out of the State Court about the prosecutor,s criteria and motives for case selection. To counter this impression, the international staff in the Special Department for War Crimes has spent over nine months developing a demographic war crimes database. The database will sort by municipality the types of crimes committed and the availability of witnesses and suspects and identify those who were in

leadership positions within respective armies when the crimes were committed.

18. (C) In conjunction with this information, the Prosecutor,s Office is also developing objective criteria for case selection, which could be explained to the public and clarify why certain cases have been moved to the head of the line for prosecution. We have been urging the Prosecutor,s Office to make both these projects a priority since the February ICJ verdict, and they should be completed in the next few weeks. Both will help the Prosecutor,s Office make decisions about where to devote scarce resources.

The Special Department for War Crimes is also looking at other elements to speed up processing of cases: the strategic use of plea bargains, which have not been used to date; and selectively granting immunity, which could help process cases of lower level officials while developing witnesses and evidence against high level suspects and cases.

Unforeseen Cases Worrisome

19. (C) The Prosecutor,s Office is worried about the potential impact of new domestic war crimes complaints, which the Prosecutor,s Office would have to investigate regardless of whether they are tried by the State Court or by entity courts. According to the BiH Criminal Code, the State Prosecutor has jurisdiction over new war crimes investigations but only the State Court can authorize the transfer of a war crimes case to the entities. As a result, the State Prosecutor must investigate and issue an indictment before he can file a motion requesting the Court to transfer the case-- which the Court may or may not approve. Neither the State Prosecutor nor the State Court can afford to spend scarce resources on cases that will ultimately be tried by the entities. This issue may increase tension between the Prosecutor,s Office and the State Court. Without a change in the BiH Criminal Code, State Court President Meddzida Kreso will not allow the Prosecutor to transfer a case without the Court,s approval.

SARAJEVO 00002555 003 OF 004

Problems with Witnesses and Suspects

110. (C) Issues related to witnesses and suspects have been a problem for both prosecutors and judges. Some witnesses, preferring not to "stir up the pot" or relive past traumas, refuse to testify; others are difficult to locate or have already died. Witnesses who agree to testify are sometimes burdened with having to testify about related events in multiple trials against different defendants. This has led to confusion among the witnesses, judges, prosecutors, and defense attorneys. Some prosecutors and judges have also expressed concern that, within ten to fifteen years, many witnesses and suspects cases will be unavailable due to incapacitation or death. Moreover, some suspects can not be located or, if they have dual citizenship, flee to neighboring countries which can not extradite their citizens, thereby escaping justice in Bosnia.

State Court: Gaining Experience

111. (C) The State Court and its judges have also had to deal with organizational problems of a new institution, but it is learning from these experiences. In the early stages of the Srebrenica-related Kravica trial, the Court,s largest case with 11 defendants, judges required hours to address many procedural issues, for example. They are now familiar with the relevant arguments and only need a few minutes privately to reach many decisions. These working relationships among the panel judges contribute to a trial,s momentum and provide future trial judges with written arguments and

analyses, which can help them interpret and analyze related issues they may encounter.

Focus on Efficiency

¶12. (C) The national and international judges at the State Court are aware of the need to improve efficiency but that this will take time to achieve. American judge Shireen Fisher (please protect) said discussions at the recent judicial college revealed much agreement among the judges regarding barriers to the court,s further progress. According to Fisher, a better case management system would alleviate many of the problems identified by the judicial college. Fisher noted that some local judges are apprehensive about implementing aspects of the current case management system because they are not specifically mentioned in Bosnia,s Criminal Procedure Code. These judges must be convinced that the proposed changes are consistent with the criminal procedure code despite the absence of a specific reference to them.

¶13. (C) The Court is also looking at establishing standard checklists and forms for judges, prosecutors, and defense counsel in the pre-trial phase to improve efficiency and uniformity. The need for translation services is also proving to be a challenge for the Court. All of the Court,s documents must be translated quickly but accurately in legal terms. Many of the ICTY documents and evidence that are in French or English must also be translated into the local language, especially for defense counsels, which must review the documents in order to prepare for their cases.

Comment

¶14. (C) The war crimes prosecutors and judges, particularly the international secondees, appear to understand what measures are needed to improve the efficiency and work of the new institution. Victims and survivor groups are likely to oppose some of these proposals, such as prosecutorial guidelines and case selection criteria, which imply that not all war crimes complaints will go to trial. Political and moral support from government leaders, which is usually lacking, would help offset criticisms and increase the likelihood of success. Adequate funding will also be necessary for the continued work and progress of the Prosecutor,s Office and the State Court, but as we witnessed after the ICJ verdict, politicians, professed concerns for "justice" are usually not matched by support for the state-level institutions charged with delivering it. The

SARAJEVO 00002555 004 OF 004

international secondees have made a valuable contribution to both the Prosecutor,s Office and the State Court and are driving many of the changes outlined above.

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